IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 14, 2007

JERRY WAYNE POINTER v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2000-A-302 Cheryl Blackburn, Judge

No. M2007-00384-CCA-R3-PC - Filed March 10, 2008

The petitioner, Jerry Wayne Pointer, appeals the denial of his petition for post-conviction relief. On appeal, he argues that he received ineffective assistance of counsel and specifically contends that counsel failed to: request funds for an expert witness, fully investigate in preparation for trial, challenge evidence, move for a mistrial, develop and request a jury instruction for an alibi defense, and conduct an effective cross-examination of the detective's statement. After careful review, we affirm the judgment from the post-conviction court and conclude that counsel was not ineffective in his representation of the petitioner.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Charles Walker, Nashville, Tennessee, for the appellant, Jerry Wayne Pointer.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner, Jerry Wayne Pointer, was convicted of first degree premeditated murder and sentenced as a violent offender to life imprisonment without parole. The facts of this case were summarized by this court on appeal:

> Sometime before midnight on September 20, 1999, Delores Morris was standing outside her house at 2403 Buchanan Street in Nashville when she heard the sounds of breaking glass and "a woman hollering, screaming," coming from 2407 Buchanan where the defendant lived with his girlfriend, the victim in this case, Teresa Ann Barksdale. Concerned, Morris moved closer to the defendant's house to

investigate. She thought she saw someone come out the defendant's window, but then the lights went out and there was no other activity. Going about her business, Morris left the neighborhood. Upon her return thirty minutes later, she observed a burning fire in the backyard of 2405 Buchanan, an abandoned house between her house and that of the defendant, and called the police to alert them to the fire. Based on her earlier observations of the activity at the defendant's house, Morris also told the police that she thought it was a body that was burning.

The Nashville Metro Fire Department arrived at the scene and began extinguishing what Captain Herbert Williams characterized as a small "trash fire." According to Captain Williams' testimony, they quickly put out the fire and then he noticed what he thought was a body. To get a closer look, he shined his flashlight and observed "teeth and a small framed person."

Sergeant Antionette Regnier, a Metro police officer for nine years, testified as to the condition of the victim's body:

> [The victim's] hands were behind [her] back. There was a phone cord . . . wrapped around the person's neck. The feet were gone, and I thought - I found out later this is what happens when a body burns, but it looked like someone had tried to chop up the body, dismember it, because of the way the skin was open, and the body was very badly - it just looked really bad, and I had never seen one look like that.

Sergeant Regnier proceeded to secure the scene and notify homicide detectives.

On the scene by this point were Officer James Pearce and Detective Steve Cleek who initiated a canvas of the neighborhood, first approaching the defendant's house because it was next door to the crime scene. They noticed a shattered window, with the broken glass still on the porch. The defendant answered the door wearing only his boxer shorts, dress socks, and house shoes. When asked about the matter, the defendant initially said he had not seen or heard anything but then said he had noticed the fire and the firefighters next door. He explained that he did not report the fire because he liked to keep to himself. He said that the window was broken earlier that night when he drunkenly leaned up against it. However, neither Pearce nor Cleek believed that the defendant was intoxicated at the time they talked with him. The defendant told them that his "old lady," Teresa Barksdale, and her two children also lived with him, spelling her name as "B-A-R-S-D-A-L-E." He said that the children were asleep and that Barksdale was a crack addict and a prostitute who generally walked the streets all night long, so "he wasn't too concerned about her." With the defendant's consent, Pearce and Cleek performed a "health and welfare" check to make sure the children were safe. They entered the house, walked directly

to the children's bedroom, and saw that they were asleep. Cleek observed that the "curtains were down on the bed" in another bedroom of the house. As they were leaving the house, Pearce noticed what appeared to be grass on the defendant's shirtless back. Pearce asked the defendant whether it was grass or paint on his back and he replied that it was paint; however, Pearce determined that it was grass by brushing some off the defendant's back. Cleek testified that the defendant "was real short with his answers and he seemed nervous and kind of like shaky" and did not ask about the fire. Pearce and Cleek finally left, informing the defendant that someone might return to ask additional questions.

Officer Pearce and Detective Cleek, now joined by Detective David Carrell, subsequently returned to the defendant's house. This time, the defendant came to the door wearing blue jeans, with the officers' testimony differing as to whether he was wearing a shirt. Because the defendant had changed into pants with pockets, Officer Pearce told him, "There is a dead body next door. If you don't mind, . . . I'm going to pat you down and make sure you don't have any weapons," to which the defendant replied, "That's fine." The defendant was found to have a pocketknife in one pants pocket and a cigarette lighter in the other.

Detective Carrell asked the defendant about the broken window, and testified that this time the defendant said that he intentionally punched the window during a Monday night football game because he was upset that the Dallas Cowboys lost.

Carrell then entered the defendant's house a second time, describing at trial what he saw:

> [A]s I began to look around, I saw blood. I saw - I went into the master bedroom. I saw blood on a telephone and the cord, all down the cord, just spiraling down, it was blood. . . . The boots at the foot of the bed had blood, what appeared to be blood. There was [sic] some matches on the bed.
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> Next to the bed at the head of the bed, against the wall where the window was that was broken was kind of a nightstand, a little chest, a little table, and it had blood on it, and some of it was a little thick, drops of kind of thick blood, what I thought to be blood, and then there was blood on the floor. There was a folding chair that was spattered all over with blood, just everywhere, lower rungs, back, seat, under the seat. There was some that was cast-off blood against the wall.

Because he realized a more thorough search would be required, Carrell ordered everyone out of the house so that he could obtain a search warrant, which,

subsequently, was obtained and executed. Additionally, officers saw blood on a backpack and in the kitchen and found a trash bag containing blood-saturated shorts and boxer shorts, as well as an empty bottle of bleach and bleach-soaked rags that appeared to have been used in a cleaning attempt. A lighter, matches, and a butcher knife were found in the immediate vicinity of the defendant's house, and a can of charcoal lighter fluid was found near the victim's body. Blood was found on the defendant's person, and his hands had what appeared to be fresh cuts and bruises.

The defendant was placed under arrest for the murder of the victim[1] and taken into custody. At the police station, Detective Carrell again spoke with the defendant who repeatedly said that he did not understand what was happening. Reading from his supplemental report, Carrell testified as to what he told the defendant:

> I believe that the relationship between you and [the victim] had deteriorated to the point that your confrontations had become increasingly physical and violent. He [the defendant] nodded his head up and down affirmatively. I said, When you got home from work last night around 5:00, you never dreamed that within a few hours, you would get so angry at [the victim] that you would hurt her. He nods his head from side to side, and I said, Before you knew it, you were hitting her. You pushed her through the window. You chased her through the backyard and into the yard next door . . . and then by that time, you were so angry, you strangled her, tied her up, and set her on fire. Then you were afraid. You tried to clean up the blood in the house. You changed your clothes and hoped all this was just a bad dream, a nightmare. He nodded his head up and down. I said, Jerry, when you first met [the victim], you would never have thought in a million years that it would end like this. You would have never believed that some day, you would get so angry at this woman . . . that you would end up killing her. He nodded his head from side to side . . . negatively.

Tara Barker, employed as a special agent forensic scientist by the Tennessee Bureau of Investigation ("TBI"), testified that test results showed petroleum distillate, an ingredient commonly found in charcoal lighter fluid, was present on the victim's shirt. TBI Special Agent Forensic Scientist Michael Turbeville testified that forensic DNA tests showed that it was the victim's blood that was found on the defendant's person and the cigarette lighter found in his pocket, as well as on the mattress, boots, boxer shorts, and chair seized by the police.

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[1] The victim's body had been identified by a family member by this point.

An autopsy of the victim showed that her death was a homicide caused by manual strangulation which, according to the medical examiner's testimony, requires constant pressure on the victim's throat, the victim generally losing consciousness after thirty to forty seconds and dying after three to four minutes. The victim had been beaten before she was killed; a telephone wire was wrapped around her neck four times and then run down her back where it was wrapped around her wrists. A piece of glass was embedded in her breast. Her skin was extensively charred, and severe heat had caused her legs to fracture and her skin to split open in many areas. The medical examiner testified that the victim was dead before she was set on fire. No drugs or alcohol were found in her system. Although the cause of death was manual strangulation, the medical examiner testified that either the ligature strangulation or the fire was sufficient to cause death.

At trial, a neighbor testified as to an incident that occurred four or five weeks before the murder. Sometime between 1:30 and 2:00 a.m. at that earlier time, Larry Clopton, who lived across the street from the defendant, responded to loud knocking at his front door. Opening the door, Clopton saw the defendant hiding behind a van and the victim in front of the next-door neighbor's house trying to get inside. The victim was wearing only a slip and her foot was bleeding. Clopton and his wife brought the victim inside their house, and the defendant returned to his house across the street. According to Clopton's testimony, the victim was "hysterical, terrified, fearing for her life," and kept repeating, "He is going to kill me, he is going to kill me." Clopton added that the victim said she and the defendant had been fighting and she had to jump out a window because the defendant was going to kill her. Clopton then telephoned the victim's family to come get her.

While they were waiting for the victim's family, the defendant knocked on Clopton's door and asked to speak with the victim. Clopton went outside and spoke with the defendant who appeared calm and convinced Clopton that the incident was over and that he just wanted to talk with the victim. Fearing that the defendant was armed, the victim was reluctant to come outside. The victim searched the defendant but found nothing. The victim's sister, Fay Cummins, and brother-in-law arrived to pick up the victim and, as they were leaving, the defendant suddenly attacked the victim. Clopton testified: "He broke for her . . . and he started beating her in the back of the head, and in her back, and then he reached in his back pocket and pulled out this butcher knife." The victim's sister testified that "as [the victim] proceeded to get into the truck, [the defendant] started to hit her, started fighting her, hitting her in the head, and my husband, Virgil, grabbed her arm to pull her up into the truck, and as he was pulling her into the truck, [the defendant] pulled out a knife that came from behind his back, and started stabbing at her, and he caught her on her ankle." The victim escaped when her family pulled her into their vehicle car and drove away. However, two weeks later, the victim returned to live with the defendant.

Dr. Pamela Auble was the only defense witness to testify at trial. She said that the defendant had an IQ of 65 when she tested him. He read at a third grade level and could write, although his spelling was not "very good." She described her analysis of the defendant:

> He is suffering from an adjustment disorder with anxiety and depression which is just simply a reaction to the circumstances in which he feels badly. He feels anxious and depressed. He suffers from intermittent explosive disorder, which is a disorder in which - it is impulse control disorder in which people lose control of themselves, even without much provocation. They can lash out and sort of have a rage attack is what it is. It is often associated with his cognitive deficits; deficits in reasoning and in flexibility, which, in fact, he showed on my testing. He also had some language problems. He has a history of alcohol abuse. That would be a diagnosis, and right now, he is functioning in a retarded range. I don't think he has always been retarded from the school records, but that is where his functioning is right now.

Dr. Auble testified that she had reviewed the facts of the matter for which the defendant was then being tried and found "they were consistent with an outburst of anger that resulted in a physical altercation that did not appear to be planned out with any forethought particularly." In her opinion, the defendant was not capable, at the time of the crime, of forming the mental state for first or second degree murder.

State v. Jerry Wayne Pointer, No. M2001-02269-CCA-R3-CD, 2003 Tenn. Crim. App. LEXIS 174, at *3-14 (Tenn. Crim. App. at Nashville, Feb. 28, 2003).

Analysis

On appeal, the petitioner argues that he received ineffective assistance of counsel and asserts eight separate reasons why counsel was ineffective. This court reviews a claim of ineffective assistance of counsel under the standards of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), and Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The petitioner has the burden to prove that (1) the attorney's performance was deficient, and (2) the deficient performance resulted in prejudice to the defendant so as to deprive him of a fair trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064; Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). The failure to prove either deficiency or prejudice justifies denial of relief; therefore, the court need not address the components in any particular order or even address both if one is insufficient. Goad, 938 S.W.2d at 370. In order to establish prejudice, the petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

The test in Tennessee to determine whether counsel provided effective assistance is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. Baxter, 523 S.W.2d at 936. The petitioner must overcome the presumption that counsel's conduct falls within the wide range of acceptable professional assistance. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; State v. Honeycutt, 54 S.W.3d 762, 769 (Tenn. 2001). Therefore, in order to prove a deficiency, a petitioner must show "that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad, 938 S.W.2d at 369 (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065).

In reviewing counsel's conduct, a "fair assessment . . . requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Nichols v. State, 90 S.W.3d 576, 587 (Tenn. 2002) (citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997); Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). We will address each claim separately.

First, the petitioner argues that counsel failed to request funds for an expert witness to assist in his defense, specifically with regard to confronting the State's expert. He argues that he should have been entitled to funds from an expert because our supreme court has previously found some indigent defendants to be entitled to such funds. However, he does not cite to any particularized need for an independent expert. Our supreme court has concluded that a defendant should be granted access to an independent expert only after proving a particularized need through a showing that the facts and circumstances of his case would require an expert to insure a fair trial. State v. Barnett, 909 S.W.2d 423, 431 (Tenn. 1995). To demonstrate a "particularized need" a defendant must show that (1) he or she will be deprived of a fair trial without the expert assistance, and (2) there is a reasonable likelihood that the assistance will materially aid him or her in the preparation of the case. Id. at 430. Our supreme court held that unsupported assertions that an expert is necessary to counter the State's proof is not sufficient. Id.

Here, the petitioner has failed to support his claims that independent experts would have been helpful to his case. The petitioner did not deny the killing. There was no particularized need for experts regarding the physical evidence or the autopsy. The cause and manner of the victim's death were not contested. Further, the petitioner failed to present any experts at the post-conviction hearing to support his argument. It is well settled that a petitioner who contends trail counsel failed to discover, interview, or present witnesses in support of his defense should present those witnesses at the post-conviction evidentiary hearing. Because the petitioner failed to present any experts to indicate that they would have testified favorably for the defense, he has failed to show prejudice.

Next, the petitioner contends that counsel failed to adequately investigate some tire tracks found at the scene. He contends that tire tracks found in the yard would have matched tires from the car of the victim's brother and claims they were important because the car was parked in the yard on the night the victim was killed. The petitioner did not present any evidence during the post-conviction hearing that the tracks existed or that they were relevant. The petitioner has failed to meet his burden of showing counsel was ineffective for failing to investigate the alleged tire tracks.

Next, the petitioner argues counsel was ineffective for failing to interview and investigate a number of witnesses. However, he failed to present these witnesses during the post-conviction hearing. When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing. Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). The witnesses were not called to testify; therefore, this issue is waived.

Next, the petitioner argues that counsel failed to allow him to listen to or view any of the statements he made to police. The petitioner testified that he did not make the statements admitted during trial and argues that if counsel had allowed him to review his statements he would not have been convicted. Counsel testified that he gave the petitioner copies of his discovery and reviewed the materials with the petitioner. Counsel filed a motion to suppress the statements and conducted a hearing to litigate the motion. The petitioner has failed to show that counsel was ineffective with regard to this issue. This issue is without merit.

Next, the petitioner argues that counsel failed to challenge the admissibility of the evidence obtained by "swabbing" him. The petitioner argues that eight police officers made him take off his shirt and rubbed his back with a blood soaked "q-tip." He alleged that he gave consent to search the house but did not consent to a "swabbing." During the post-conviction hearing, he claimed that the police planted the evidence on his person. The State argues that the petitioner failed to present any evidence, other than his own testimony, to corroborate his story that the police planted the evidence. Here, the petitioner has failed to show that counsel was deficient.

Next, the petitioner argues that counsel was ineffective for failing to move for a mistrial when his prior record, including a conviction for arson and a conviction for a prior murder, was introduced at trial. He argues that this was damaging information and that it prejudiced his case. The record before us on appeal does not include a copy of the trial transcript in which the petitioner alleges the State introduced the damaging prior record. The order from the post-conviction court reflects that the jury never heard about the prior murder conviction. During the post-conviction hearing, counsel testified that he knew their expert witness would be questioned about the petitioner's past, including his criminal record. Counsel testified that part of the defense was for the expert to testify about his past to establish that the petitioner was unable to form the requisite mental culpability to commit the offense. It was necessary for the expert to testify about the prior violent acts of the petitioner because those actions supported her diagnosis of the petitioner. Counsel also testified that the petitioner was aware prior to trial that the expert would testify about his prior history. Further, this court addressed the admissibility of some of the petitioner's prior

convictions in our opinion on direct appeal. The petitioner has not demonstrated that counsel was ineffective in this issue.

Next, the petitioner contends that counsel failed to properly develop his alibi defense. The petitioner testified that he did not take the stand to testify because trial counsel prevented him from testifying. He gave his proposed testimony during the post-conviction hearing and proposed that someone else was responsible for the victim's death. Counsel testified that the cause and manner of the victim's death were not contested so there was no reason to seek and develop an alibi defense. Counsel testified that their defense was that the petitioner did not have the requisite mental intent to support a conviction for first or second degree murder. He said the petitioner admitted to the crime and there was nothing to suggest he was not involved in the victim's murder. The petitioner has failed to show that counsel was deficient for not pursuing an alibi defense.

The final issue presented by the petitioner is that counsel was ineffective in cross-examining the detective's statement to the jury that the petitioner "made up all of this stuff." Counsel testified that he filed a motion to suppress the petitioner's statements to the police and conducted a hearing on the motion. Counsel unsuccessfully attempted to have the statements excluded. During the post-conviction hearing, the petitioner acknowledged that counsel conducted cross-examination of all the State's witnesses. The petitioner has not supported his conclusion that the outcome of trial would have been different had counsel conducted his cross-examination differently. Therefore, we conclude he has not met his burden of showing either that counsel was ineffective or that he was prejudiced by counsel.

Conclusion

Based on the foregoing and the record as a whole, the petitioner has failed to show that trial counsel was ineffective. We affirm the judgment from the post-conviction court.

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JOHN EVERETT WILLIAMS, JUDGE